MEMORANDUM OF LAW

DATE: January 22, 1990

TO: Ralph Shackelford, Purchasing Agent,
Purchasing Department

FROM: City Attorney

SUBJECT: Prevailing Wages on all City Projects

I

INQUIRY

You recently requested an opinion as to whether the San Diego City Charter allows the City Council to require prevailing wages on all City construction projects regardless of funding source.

II

BACKGROUND

The State of California, in order to ensure that public works projects were constructed and maintained by adequately compensated workers, has consistently required that prevailing wages be paid "to all workers employed on public works," presently, California Labor Code section 1771. However, as early as 1932 case law has held that "[t]he prevailing wage law, a general law, does not apply to the public works projects of a chartered city, as long as the projects in question are within the realm of 'municipal affairs.'" City of Pasadena v. Charleville, 215 Cal. 384, 392 (1932). But the City of San Diego continued to require that prevailing wages be paid on all public works contracts.

Originally, the City adopted wage determinations utilizing input collected from the San Diego County Labor Council, the Building Trades Council, the Associated General Contractors Association and the Building Contractors Association. Subsequently, the State Director of Industrial Relations determined and published the prevailing wage in each local area in the State. The inclusion of that determination was required in all public works specifications and contracts. In order to comply with California statutory law, the City adopted Resolution

No. 218685, dated June 22, 1977, stating that prevailing wages would be included in all City contracts until such time that that resolution should be superseded by a later resolution of the Council.

In 1980 a City Manager's Report No. 80-191 addressed the issue of prevailing wages. Since the State Director of Industrial Relations had begun determining wage requirements for

each local area the report stated, "[u]nder these circumstances, it appears in the City's best interest to abandon our 'Prevailing' Wage Determination as there is no way of determining the actual prevailing wage, only the published union wage rates are available. Nonunion contractors often pay scale or above when workers achieve high productivity. Others obviously pay less." In addition, that report stated that the fiscal impact of taking such action would be "[u]ndetermined savings due to lower construction costs and less restrictive specifications."

Consequently, in April, 1980, Resolution No. 251555 was adopted, which specifically rescinded the earlier resolution and further stated that "[i]t is considered appropriate thereafter to use the [F]ederal Davis-Bacon or State Department of Industrial Relations Wage Determinations only when required by Federal or State grants and on other jobs considered to be of State concern."

The State of California Department of Industrial Relations challenged the City's legal authority to delete the prevailing wage requirements. Even though the earlier case of City of Pasadena v. Charleville, 215 Cal. 384 (1932) had stated that local projects were municipal affairs, there was no clear definition of what constituted a municipal affair. "No exact definition of the term 'municipal affairs' can be formulated, and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case." Bishop v. City of San Jose, 1 Cal.3d 56, 62 (1969). In the lawsuit, the Superior Court in San Diego denied the state's petition to either rescind the City's resolution or amend it to comply with state law. The state then appealed and the Court of Appeals upheld the lower court's holding. In Vial v. City of San Diego, 122 Cal.App. 3d 346, 348 (1981), the court referenced the California Superior Court case, City of Pasadena v. Charleville, 215 Cal. at 392, "[p]revailing wage law, a general law, does not apply to the public works projects of a chartered city, as long as the projects in question are within the realm of 'municipal affairs,'" and held that: "Here the rescinding resolution specifically excludes state and federally funded projects and

those 'considered to be of State concern'; application of the resolution is limited to projects within the sphere of 'municipal affairs.' Under Charleville the resolution is valid despite its conflict with the general prevailing wage law." Id.

As a result of that case, prevailing wages are currently paid only on city projects on which payment of prevailing wages is a

condition of receiving federal or state money or are jobs of statewide concern. Prevailing wages are not paid on public works projects that are purely municipal affairs.

III

DISCUSSION

Presently, Section 94 of the San Diego City Charter requires that construction contracts over a certain amount of money be let to the lowest responsible and reliable bidder. The sealed bid and competitive pricing requirements of Section 35 of the Charter, along with the "lowest responsible bidder" provisions of Charter Section 94, are based on the strong public policy of protecting the taxpayer from fraud, waste, and dissipation of public funds. It has been held that cities have no power to enter into contracts made in disregard of these provisions. Miller v. McKinnon, 20 Cal.2d 83 (1942).

The term "lowest responsible bidder" has been strictly defined by the Supreme Court of this state to mean that a contract must be awarded to the lowest bidder unless it is found that he or she is not responsible; that is, not qualified to do the particular requirement of the proposed work, along with the price, in determining who is the low bidder. Inglewood-Los Angeles County Civic Center Authority v. Superior Court, 7 Cal.3d 861 (1972); Cyr v. White, 83 Cal.App.2d 22 (1947); West v. Oakland, 30 Cal.App. 556 (1916).

In Associated Gen. Etc. v. San Francisco Unified School, 616 F.2d 1381 (9th Cir. 1980) (re. an MBE/WBE program in the San Francisco Unified School Board), the court stated that the words "lowest responsible bidder" gave the Board authority to consider only the amount of the bid, the minimum qualifications of the bidder as to financial ability and skill to complete the job successfully, and the quality of the bidder's past work. The court also stated at pp.1390-91, that the low bid law, passed in 1917 . . . was "designed to protect the public fisc by preventing public officials from awarding contracts uneconomically on the basis of special friendships."

If the City were to require prevailing wages on all contracts, there is the possibility that contractors who either do not or cannot pay prevailing wages for whatever reason, would be excluded from the bidding process. In effect, the City would not be letting the contract to the lowest responsible and reliable bidder, but to the lowest responsible and reliable bidder who pays prevailing wages. Prevailing wage requirements may not necessarily affect a large number of contractors, since some may pay prevailing wages already. However, the City may not

exclude a class of contractors who may be affected by such a requirement.

Though we found no California cases on point, there is an indication that a California court would agree with this analysis. Courts in other states have dealt with this issue. In a Louisiana case, Parish Council, Etc. v. Louisiana Highway, Etc., So.2d 272 (1961), 131 So.2d 272 (1961), where a public works contract let by the Parish of East Baton Rouge required the contractor to pay the prevailing wage for the area as set forth in the specifications, the court held that such requirement violated the parish's charter, which required contracts to be let by competitive bidding and to the lowest responsible bidder. Quoting 63 C.J.S. Municipal Corporation, the court there said, "[c]ompetitive bidding is frequently required in the letting of contracts for municipal improvements. Failure in this respect . . . renders the contract void. . . ." Parish Council at 333. "Provisions requiring the letting of a municipal contract for a public improvement on competitive bidding are violated by any scheme or device which prevents, or tends to prevent, or restrict, or suppress, competition among persons who may desire to become bidders." Id. at 336. In Hillig v. City of St. Louis, 85 S.W.2d 91, 92 (1935), the Supreme Court of Missouri stated: "[i]t is well settled that charter provisions requiring that contracts for public works be awarded, upon a public letting, to the lowest responsible bidder, are intended to secure free and unrestricted competition among bidders, to eliminate fraud and favoritism, and to avoid undue or excessive cost which would otherwise be imposed upon the taxpayer."

"Thus we have a situation where a contractor who can do the work equally as well, although cheaper, is excluded from bidding . . . it is clear that the ordinance [requiring prevailing wages on all jobs] imposes a limitation other than responsibility upon all bidders, and hence the free competition prescribed by the charter is excluded and stifled." Id. at 92. See, also Philson v. City of Omaha, Nebraska, et al., 93 N.W.2d 13 (1958); Bohn v. Salt Lake City, 8 P.2d 591 (1932).

IV
CONCLUSION

A general requirement that prevailing wages must be paid on all City projects presents two (2) problems; one flows from the Charter while the other presents a policy dilemma:

1) Problems would arise from noncompliance with the Charter lowest responsible bidder requirement;

2) Potential savings to the City through lower

construction costs would be lost.

An amendment to the San Diego City Charter requiring payment of prevailing wages on all City contracts could be put before the voters and, if passed, such a requirement would be legal. However, it is the opinion of this office that a requirement to pay prevailing wages in all contracts would violate the City Charter as it is presently worded.

JOHN W. WITT, City Attorney
By
Mary Kay Jackson
Deputy City Attorney

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